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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 USI Insurance Services LLC,

10 Plaintiff,

11 v.

12 Alliant Insurance Services Inc., a California
13 corporation, William J. Havard II and Jane
14 Doe Havard, husband and wife, Robert
15 Engles and Jane Doe Engles, husband and
16 wife, Jenise Purser and John Doe Purser,
17 husband and wife, and Justin Walsh and Jane
18 Doe Walsh, husband and wife,

19 Defendants.

No. CV-23-00192-PHX-SMB

ORDER

20 Pending before the Court is Defendants' Rule 12(b)(6) Motion to Dismiss Plaintiff's
21 First Amended Complaint (Doc. 76). Plaintiff filed a response (Doc. 90), and Defendants
22 filed a reply (Doc. 91). After reviewing the parties' arguments and the relevant case law,
23 the Court will deny Defendants' Motion.

24 **I. BACKGROUND**

25 This case stems from the resignation of four USI Insurance Services ("USI")
26 employees and their subsequent swift reemployment at Alliant Insurance Services
27 ("Alliant"). To rule on the present Motion, the Court must take the allegations of material
28 fact as true and construe them in favor of the nonmoving party— here, Plaintiff. *See*
Cousins v. Lockyer, 568 F.3d 1063, 1067 (2009). USI's Amended Complaint (Doc. 52)
includes the following claims: (1) breach of contract (against Havard, Engles, Purser, and
Walsh); (2) breach of the duty of good faith and fair dealing (against Havard and Engles);

(3) breach of the duty of loyalty (against Havard and Engles); (4) tortious interference with contract (against all Defendants); (5) aiding and abetting breach of the duty of loyalty (against Alliant); and (6) declaratory judgment (against Alliant). (*Id.* at 29–33.) The claims relate to multiple covenants signed by Defendants Havard, Engels, Purser, and Walsh (“Employee Defendants”) while employed by USI. These covenants are summarized as follows:

• ***Confidentiality During and Following Term.*** During the Term and for five (5) years after Producer is no longer employed . . . for any reason, they will not use or disclose any Confidential Information of the Company, any Predecessor or any USI Company [except under limited circumstances outlined in the agreements].

• ***Non-Solicitation of Clients and Active Prospective Clients*** (a) During the Term and for two (2) years after Producer is no longer employed . . . for any reason, Producer shall not, without the Company’s prior written consent, directly or indirectly, on behalf of any Competitive Business in any capacity: (i) solicit or attempt to solicit Insurance Services in competition with the Company to any Client Account; (ii) consult for any Client Account with respect to Insurance Services in competition with the Company; (iii) sign a broker of record letter with any Client Account to provide Insurance Services in competition with the Company; or (iv) induce the termination, cancellation or non-renewal of any Client Account; in each case with respect to any Client Account, which is a Client Account of the Company at the time of such solicitation, that Producer managed or regularly serviced and/or about which Producer obtained Confidential Information on behalf of the Company within the last two (2) years of Producer’s employment

(b) During the Term and for six (6) months after Producer is no longer employed . . . Producer shall not, without the Company’s prior written consent, directly or indirectly, on behalf of any Competitive Business in any capacity: (i) solicit or attempt to solicit Insurance Services in competition with the Company to any Active Prospective Client; (ii) consult for any Active Prospective Client with respect to Insurance Services in competition with the Company; or (iii) sign a broker of record letter with any Active Prospective Client to provide Insurance Services in competition with the Company; in each case with respect to any Active Prospective Client that Producer solicited and/or about which Producer obtained Confidential Information on behalf of the Company within the last six (6) months of Producer’s employment

1 • ***Non-Acceptance/Non-Service of Clients and Active Prospective***
 2 ***Client*** . . . (a) During the Term and for two (2) years after Producer is no
 3 longer employed . . . Producer shall not, directly or indirectly, on behalf of
 4 any Competitive Business in any capacity: (i) sell, provide, or accept any
 5 request to provide Insurance Services in competition with the Company to
 6 any Client Account; or (ii) sign or accept a broker of record letter to provide
 7 Insurance Services in competition with the Company to any Client Account;
 8 in each case with respect to any Client Account, which is a Client Account
 9 of the Company at the time of such solicitation, that Producer managed or
 10 regularly serviced and/or about which Producer obtained Confidential
 11 Information on behalf of the Company within the last two (2) years of
 12 Producer's employment hereunder . . . (b) During the Term and for six (6)
 13 months after Producer is no longer employed . . . Producer shall not, directly
 14 or indirectly, on behalf of any Competitive Business in any capacity: (i) sell,
 15 provide, or accept any request to provide Insurance Services in competition
 16 with the Company to any Active Prospective Client; or (ii) sign or accept a
 17 broker of record letter to provide Insurance Services in competition with the
 18 Company to any Active Prospective Client; in each case with respect to any
 19 Active Prospective Client that Producer solicited and/or about which
 20 Producer obtained Confidential Information on behalf of the Company
 21 within the last six (6) months of Producer's employment

15 • ***Non-Interference With Employees*** . . . Producer agrees, during the Term
 16 and for two (2) years after Producer is no longer employed . . . Producer shall
 17 not, directly or indirectly, on behalf of any Competitive Business in any
 18 capacity: (a) solicit the employment, consulting or other services of, or hire,
 19 any other employee of the Company; or (b) otherwise induce any such
 20 employee to leave the Company's employment or breach an employment
 21 agreement therewith; in each case with respect to any employee of the
 22 Company who is employed by the Company at the time of such solicitation
 23 or hiring and with whom Producer worked or obtained knowledge about as
 24 a result of Producer's employment with the Company

22 (Doc. 52 at 5–8, 11–13, 17–18, 21–23.) The following terms are defined in the agreement
 23 as follows:

24 (a) **“Active Prospective Client”** means any Person or group of Persons who
 25 the Company specifically solicited or had documented plans to solicit within
 26 the six (6) months preceding the termination of Producer's employment
 27 hereunder.

27 (c) **“Client Account”** means the account of any client (including, without
 28 limitation, any retail insurance agent or broker, individual insured,
 association and any member thereof, and any insurance carrier or other entity

1 to the extent third party administration claims processing or underwriting is
 2 performed by the Company for such carrier or other entity) which is or was
 3 serviced by the Company in connection with the Company's business,
 4 regardless of whether such services are provided by, or through the licenses
 of the Company or any shareholder, employee or agent of the Company.

5 **(e) "Competitive Business"** means any Person engaged in the production,
 6 distribution, marketing or sale of a Competitive Product. Where a
 7 Competitive Business is part of a larger business involving both competitive
 8 and non- competitive products, the terms of this Agreement shall only apply
 to that part of the business which involves the production, distribution,
 marketing or sale of a Competitive Product.

9 **(f) "Competitive Product"** means any product or service, in existence, that
 10 competes, or is reasonably anticipated to compete, in the same markets with
 11 a product or service of the Company, in existence, which Producer or the
 12 Company has sold, marketed, distributed or developed in the last two (2)
 13 years of Producer's employment with the Company, or about which the
 Producer has acquired Confidential Information.

14 **(g) "Confidential Information"** means . . . any information of the
 15 Company, any Predecessor and/or a USI Company to which Producer has
 16 access, that is not already generally available to the public . . . including but
 17 not limited to: (i) the identity, authority and responsibilities of key contacts
 18 and decision-makers employed by the Client Accounts or Active Prospective
 19 Clients of the Company or any Predecessor; (ii) the types, terms and
 20 conditions of coverage and particularized insurance needs, requirements, risk
 21 specifications, preferences, expiration dates, claims and loss histories, and
 22 commission rates, fees and premiums of the Client Accounts or Active
 23 Prospective Clients of the Company or any Predecessor; (iii) the terms and
 24 conditions of benefits and compensation plans of the Client Accounts or
 25 Active Prospective Clients of the Company or any Predecessor; (iv) the
 26 information furnished to the Company or any Predecessor in confidence by
 27 any Client Account or Active Prospective Client; (v) the business plans,
 28 marketing strategies, and pricing structure, criteria and formulae for
 insurance and benefits products and claims management, and unpublished
 financial data and statements of the Company, its corporate affiliates or any
 Predecessor; (vi) the lists of the Client Accounts or Active Prospective
 Clients of the Company or any Predecessor, and any analyses and
 compilations thereof . . . (ix) any and all other proprietary information of the
 Company, any Predecessor or a USI Company, including any information
 contained within a proprietary database

(i) **“Goodwill”** means the competitive advantage, including the expectation of new and/or continued patronage from Client Accounts and Active Prospective Clients based on the Company’s or any Predecessor’s investment in repeated contacts, business transactions, Confidential Information, or other efforts to develop lasting relationships.

(n) **“Predecessor”** means any Person, in its capacity as predecessor-in-interest to the assets of the Company.

(q) **“USI Business”** means the businesses provided by the USI Companies, including, without limitation, insurance agency and brokerage, and related insurance services.

(*Id.* at 8–9, 13–14, 18–20, 23–24.)

USI further asserts the parties agreed to the following:

“If a court were to find that any covenants in their respective Employment Agreements exceeded the permissible scope or limit, ‘such covenants shall be reformed to the maximum permissible time or scope limitations’ and that “[i]f a court refuses to enforce any of these covenants, in whole or in part, the unenforceable terms shall be eliminated (“blue penciled”) . . . to the minimum extent necessary to permit the remaining terms to be enforced.”

(*Id.* at 9, 15, 20, 24.)

USI provides insurance, risk management, and other related services to customers.

(*Id.* at 3.) USI’s insurance brokers, also called “producers” are employed to “identify, solicit, and service clients and develop and foster relationships with those clients for the benefit of USI.” (*Id.*) USI asserts it provides its producers with “leads, training, education, business development opportunities, financial support, access to insurers and underwriters, and infrastructure to support these efforts.” (*Id.* at 4.) Moreover, USI alleges their producers work with clients to discuss renewal options for repeat business, cross-selling opportunities for other USI products, and obtaining referrals. (*Id.*)

USI alleges that in 2017, it purchased all issued and outstanding equity interests in Wells Fargo Insurance Services, USA Inc., (“WFIS”)—the corporation Havard and Engles worked at prior to becoming USI employees. (*Id.*) WFIS was then renamed USI Insurance Services National, Inc. (“USIN”), but later merged into USI Insurance Services, LLC

1 (“USI”). (*Id.*) USI asserts that it is the assignee and successor-in-interest to WFIS and
2 USIN. (*Id.*)

3 After the purchase and merger, USI alleges it offered Employee Defendants
4 positions to maintain customer accounts and business goodwill. (*Id.* at 4–5, 10–11, 16,
5 20.) USI attests that Havard and Engles were offered positions with the same client
6 accounts they held from WFIS, and that the offers were contingent upon accepting the
7 terms of their respective employment agreements. (*Id.*) USI alleges that Employee
8 Defendants became employees on November 30, 2017. (*Id.*) USI also contends that
9 Employee Defendants were provided with additional compensation in the form of a
10 retention bonus payment, and that they paid Havard an additional acquisition bonus. (*Id.*)

11 USI further alleges that Employee Defendants agreed to the following terms: (1) as
12 producers they held a responsibility for maintaining and enhancing USI’s goodwill with
13 client accounts and relationships, as well as prospective clients; (2) that USI had a
14 “reasonable, necessary and legitimate business interest” in protecting USI’s “Confidential
15 Information, Client Accounts, relationships with Active Prospective Clients, Goodwill,
16 employee relationships, and ongoing business” and (3) the terms of the agreement were
17 necessary and reasonable for protecting those interests. (*Id.* at 10–11, 16, 21.)
18 Furthermore, USI alleges that Havard and Engles acknowledged a duty of loyalty to USI
19 and “agreed to use their best efforts to perform their duties and responsibilities ‘faithfully,
20 diligently, and completely’” in furtherance of USI. (*Id.* at 5, 11.)

21 USI also contends that Havard and Engles acknowledged in their agreements that
22 their services were “of a special unique, and extraordinary character[,]” that “it would be
23 extremely difficult or impracticable to replace such service[s]” and that “any damage
24 caused by [Havard or Engles] breach of [the limited covenants] of the Agreement would
25 result in irreparable harm to the business of the Company for which money damages alone
26 would not be adequate. . . .” (*Id.* at 9–10, 15.) Furthermore, USI asserts Havard and Engles
27 agreed that if they violated the limited covenants section of the agreement, USI was entitled
28 to injunctive or other equitable relief. (*Id.*)

1 Additionally, USI notes that, Havard and Engles agreed to the following termination
2 provision

3 *Termination by Producer.* Producer may terminate Producer's
4 employment... by giving at least sixty (60) days written notice to the
5 Company. The termination of employment shall be effective on the date
6 specified in such notice; provided, however, at any time following receipt of
7 such notice, the Company may: (a) accept Producer's termination of
8 employment hereunder effective on such earlier date specified by the
9 Company; and/or (b) require Producer to cease performing any
10 services . . . until the termination of employment.

11 (*Id.*) USI also argues that as the successor and assignee of WFIS, USI is authorized to
12 enforce the terms Havard and Engles agreed to. (*Id.* at 10, 15.)

13 USI alleges that on November 8, 2022, Alliant's Senior Vice President Andy Orear
14 ("Orear") began contacting Engles, Havard, and other USI employees to resign from USI
15 and join Alliant. (*Id.* at 25.) USI further alleges that as of August 2022, Orear contacted
16 at least 58 USI employees to recruit them to join Alliant. (*Id.*) Additionally, USI asserts
17 that since August 2022, Orear has sent at least 240 LinkedIn communications to USI
18 employees. (*Id.*)

19 Next, USI alleges that in the last five years, it has been in nationwide litigation with
20 Alliant regarding "Alliant knowingly providing substantial assistance to USI producers to
21 resign effective immediately and encouraging USI clients to move their business from USI
22 to Alliant, in breach of the producers' contractual obligations to USI." (*Id.* at 25.) USI
23 directly cites to a Minnesota state court's partial summary judgment order in favor of USI
24 where the judge found that "Alliant corporate representatives did not explain why [the
25 producer] began servicing her former USI clients [in violation of her post-employment
26 restrictions] and instead stated that it relied on the advice of counsel." (*Id.*)

27 USI alleges that on January 24, 2023, Havard resigned from USI via email and
28 effective immediately—thereby failing to provide the contractually required 60 days'
notice. (*Id.* at 25–26.) USI next alleges that on January 25, 2023, Engles also resigned
from USI by email, effective immediately. (*Id.* at 26.) USI contends that neither Defendant
provided USI with a transition plan for the clients they "abandoned." (*Id.* at 25–26.) USI

1 also alleges that concurrently, Jenise Purser, Amy Phalen, Loni Hartman, and Justin Walsh,
2 who were all members of Havard and/or Engle’s service teams at USI, also tendered their
3 resignations via email on January 25, 2023, effective immediately. (*Id.* at 26.) That same
4 day, USI alleges it had scheduled a meeting with these employees to coordinate client
5 transitions, but they did not show up to the meeting and instead resigned hours after it was
6 scheduled. (*Id.*)

7 USI alleges that no later than January 25, 2023, Havard, Engles, Phalen, Walsh, and
8 Hartman’s LinkedIn profiles were updated to show new employment at Alliant. (*Id.*) USI
9 asserts that upon information and belief, Alliant hired Havard, Engles, and their teams
10 immediately. (*Id.* 26–27.) USI argues that the purpose of the 60 days’ notice provision in
11 their employment agreements was to provide USI time to transition client accounts and
12 relationships to new producers to maintain goodwill with customers. (*Id.* at 27.) USI also
13 alleges that Havard and Engles had a combined book of client business worth over \$3.7
14 million to USI. (*Id.*) As such, USI argues that by immediately joining Alliant—a direct
15 USI competitor—and publicizing that they had done so, Havard and Engles violated their
16 agreements and “severely hampered USI’s ability to maintain and continue its goodwill
17 and relationship with client accounts.” (*Id.*)

18 USI alleges that Havard and Engles coordinated “this *en masse* resignation from
19 USI with the knowledge and substantial assistance of Alliant.” (*Id.*) Furthermore, USI
20 argues Havard and Engles “have breached, and intend to further and imminently breach,
21 the covenants of their agreements by soliciting and/or servicing for Alliant additional client
22 accounts that they managed or serviced for USI.” (*Id.*) USI alleges that “more than one”
23 USI client that was previously serviced by Havard has taken steps to move a portion of its
24 business to Alliant. (*Id.*) Similarly, USI alleges that another client “explicitly referenced
25 its long-term relationship with Havard in a call with USI regarding its business being
26 moved to Alliant.” (*Id.*) Lastly, USI alleges that multiple of Havard’s USI clients “gave a
27 broker of record letter to Alliant which, upon information and belief, would not have
28 moved in total to Alliant without Havard’s solicitation, direct or otherwise.” (*Id.*) More

1 than 100 broker of record (“BOR”) letters have been sent to USI from clients moving their
 2 business to Alliant after the resignation of Havard and Engles. (*Id.* at 28.)

3 USI also alleges that they continue to uncover additional evidence of the
 4 Defendants’ wrongdoing. (*Id.*) USI points to a voicemail left for USI client AvAir from
 5 Alliant employee Eric Harper. (*Id.*) In this voicemail, Mr. Harper said “Robert asked me
 6 to give you a call. Uh, we all made a transition over. I’m in California so I can call everyone.
 7 Um, Robert can take your call, he just can’t make calls right now. Uh, we are getting all
 8 that straightened out hopefully very very soon. But he wanted me to touch base with you,
 9 kinda fill you in on what’s going on. And please call him at any time. And uh, we are
 10 working on transitioning all his clients over here. It is a thousand times better shop. But I
 11 can explain all that to you. So, if you have a moment, please call me” (*Id.*) USI alleges
 12 that when AvAir returned Mr. Harper’s call, he admitted that he obtained the client’s
 13 contact information from Engles and proceeded to solicit their business. (*Id.*)
 14 Additionally, USI alleges that emails were sent from Alliant employees to contacts at both
 15 CBRE Group, Inc. and USAA regarding insurance coverage. (*Id.* at 28–29.) Both
 16 businesses were former USI clients and were managed or serviced by Purser, Walsh, and
 17 Havard. (*Id.*)

18 **II. LEGAL STANDARD**

19 To survive a Rule 12(b)(6) motion for failure to state a claim, a complaint must meet
 20 the requirements of Rule 8(a)(2). Rule 8(a)(2) requires a “short and plain statement of the
 21 claim showing that the pleader is entitled to relief,” so that the defendant has “fair notice
 22 of what the . . . claim is and the grounds upon which it rests.” *Bell Atl. Corp. v. Twombly*,
 23 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). This
 24 requirement is met if the pleader sets forth “factual content that allows the court to draw
 25 the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft*
 26 *v. Iqbal*, 556 U.S. 662, 678 (2009). “Threadbare recitals of the elements of a cause of
 27 action, supported by mere conclusory statements, do not suffice.” *Id.* Plausibility does not
 28 equal “probability,” but requires “more than a sheer possibility that a defendant has acted

unlawfully.” *Id.* A dismissal under Rule 12(b)(6) for failure to state a claim can be based on either (1) the lack of a cognizable legal theory or (2) insufficient facts to support a cognizable legal claim. *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1988). A complaint that sets forth a cognizable legal theory will survive a motion to dismiss if it contains sufficient factual matter, which, if accepted as true, states a claim to relief that is “plausible on its face.” *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570). “Where a complaint pleads facts that are ‘merely consistent with’ a defendant’s liability, it ‘stops short of the line between possibility and plausibility of ‘entitlement to relief.’” *Id.* (quoting *Twombly*, 550 U.S. at 557).

In ruling on a Rule 12(b)(6) motion to dismiss, the well-pled factual allegations are taken as true and construed in the light most favorable to the nonmoving party. *Lockyer*, 568 F.3d at 1067. However, legal conclusions couched as factual allegations are not given a presumption of truthfulness, and “conclusory allegations of law and unwarranted inferences are not sufficient to defeat a motion to dismiss.” *Pareto v. FDIC*, 139 F.3d 696, 699 (9th Cir. 1998). A court ordinarily may not consider evidence outside the pleadings in ruling on a Rule 12(b)(6) motion to dismiss. *See United States v. Ritchie*, 342 F.3d 903, 907 (9th Cir. 2003). “A court may, however, consider materials—documents attached to the complaint, documents incorporated by reference in the complaint, or matters of judicial notice—without converting the motion to dismiss into a motion for summary judgment.” *Id.* at 908.

III. DISCUSSION

As discussed above, Plaintiff brought several claims in its First Amended Complaint, which Defendants now seek to dismiss. The Court will discuss each in turn.

A. Breach of Contract

First, Defendants argue that the breach of contract claim against all individual Defendants, and specifically Havard, should be dismissed. (Doc. 76 at 4.) These claims are based on the 60-day notice requirement, the non-solicitation, and the non-acceptance/non-service agreements outlined above. As a threshold matter, Defendants

1 argue that the term “the Company” was used in some of the provisions at issue, and that
2 this term does not refer to USI. (Doc. 76 at 4–5.) They argue that the term instead refers
3 to WFIS, which became defunct when it merged with USI. (*Id.* at 5.) Therefore, they
4 contend that these provisions do not protect USI, and that Havard and Engles were not
5 bound by these provisions. (Doc. 76 at 4–7.) Plaintiff counters that as a successor and
6 assignee of WFIS, USI is authorized to enforce the terms of the agreements. (Doc. 90 at
7 4.) Plaintiff also argues that it is inappropriate to litigate the meaning of this term at this
8 stage of the case. (*Id.*)

9 The Court recognizes that interpretation of this term is important to the claims.
10 However, it also acknowledges that this is not the appropriate stage in litigation to resolve
11 this issue. Motions to dismiss are meant to test the sufficiency of the complaint, not resolve
12 any factual disputes. *See JK ex rel. R.K. v. Dillenberg*, 836 F. Supp 694, 700 (D. Ariz.
13 1993) (a motion to dismiss is not “a procedure for resolving a contest about the facts or the
14 merits of the case.”) (internal citation omitted). Here, Defendants ask the Court to move
15 beyond the sufficiency of the allegations and turn to contract interpretation. But dismissal
16 based on contract interpretation is not within the realm of a 12(b)(6) motion. *See ABC*
17 *Water LLC v. APlus Water LLC*, No. CV-18-04851-PHX-SPL, 2019 WL 3858193, at *2
18 (D. Ariz. Aug. 16, 2019). At this point, it would be premature for the Court to delve into
19 contractual interpretation. *Seitz v. Rheem Mfg. Co.*, 544 F. Supp. 2d 901, 910 (D. Ariz.
20 2008); *see also Johnson v. KB Home*, 720 F. Supp 2d 1109, 1118 (D. Ariz. 2010).
21 Moreover, the arguments presented demonstrate that the parties must have the opportunity
22 to develop the record—including on the applicability and meaning of specific contractual
23 terms. *See Affiliated FM Ins. Co. v. Hill Phoenix Inc.*, No. CV-22-00450-PHX-JJT, 2023
24 WL 244494, at *2 (D. Ariz. Jan. 18, 2023). Accordingly, the Court will not analyze
25 contractual terms in this ruling.

26 For the breach of contract claim, Plaintiff must allege “the existence of a contract
27 between the plaintiff and defendant, a breach of the contract by the defendant, and resulting
28 damage to the plaintiff.” *Snyder v. HSBC Bank, USA, N.A.*, 913 F. Supp. 2d 755, 779 (D.

1 Ariz. 2012) (quoting *Warren v. Sierra Pacific Mortg. Servs., Inc.*, No. CV-10-02095-PHX-
2 NVW, 2011 WL 1526957, at *3 (D. Ariz. Apr. 22, 2011)).

3 Defendants contend that there is no factual support for the allegations that any
4 individual defendant solicited prior USI clients, improperly accessed client information, or
5 that prior USI clients moved to Alliant due to their solicitation. (Doc. 76 at 8–9.)
6 Therefore, they claim that the breach of contract claim is merely speculative. (*Id.* at 8–10.)
7 Defendants also argue that the allegations surrounding this claim are conclusory and do not
8 contain any supporting factual enhancements. (*Id.* at 9.) Plaintiff counters by pointing to
9 non-conclusory facts alleging how Havard and Engles breached the relevant covenants.
10 (Doc. 90 at 6.) Specifically, Plaintiff points to the several allegations regarding Havard’s
11 immediate resignation from USI, recruiting former USI employees, and moving prior USI
12 clients over to Alliant. (*Id.* at 6–7.) Plaintiff further argues they sufficiently alleged that
13 Havard’s breach both caused and will continue to cause injury to USI. (*Id.* at 8.) The Court
14 agrees with Plaintiff.

15 Plaintiff has sufficiently pled in accordance with the requirements of this claim.
16 First, the Plaintiff has properly pled the existence of a contract. (Doc. 52 at 29.) Second,
17 the Plaintiff has provided sufficient factual content to allow the Court to draw a reasonable
18 inference of the alleged misconduct. Plaintiff specifically alleges numerous instances of
19 conduct that outline Havard’s alleged breach. (*Id.* at 25–30.) These allegations are not
20 conclusory or speculative. Rather, they are detailed and connect to each of the covenants
21 that Havard and Engles allegedly breached. (*See id.*) Although currently these are merely
22 allegations, they are allegations that meet the relevant pleading requirements. There are
23 sufficient facts presented to support a cognizable claim against the individual Defendants,
24 including Havard. Taken together, these factual allegations form a plausible claim that
25 each individual Defendant breached various provisions in their contracts with USI.

26 Third, Plaintiff has sufficiently asserted that Havard’s breach caused and will
27 continue to cause injury to USI. (*Id.* at 27–28.) Accordingly, USI has met the applicable
28 pleading standard with their breach of contract claim. Therefore, the Court will deny

1 Defendants' Motion as to the breach of contract claim.

2 **B. Breach of Duty of Good Faith and Fair Dealing - Havard**

3 Plaintiff next claims that Havard breached the covenants of good faith and fair
 4 dealing owed to USI. (Doc. 52 at 30.) In Arizona, the duty of good faith and fair dealing
 5 is implied in every contract. *Rawlings v. Apodaca*, 726 P.2d 565, 569 (Ariz. 1986). "The
 6 essence of that duty is that neither party will act to impair the right of the other to receive
 7 the benefits which flow from their agreement or contractual relationship." *Id.* A claim for
 8 breach of the duty of good faith and fair dealing requires a contractual relationship.
 9 Without a contract, the duty does not apply. *See Walter v. F.J. Simmons & Others*, 818
 10 P.2d 214, 222 (Ariz. Ct. App. 1991) (agent dismissed from bad faith claim "because he
 11 owed no contractual duty to act in good faith or deal fairly"). A party can breach this duty
 12 "both by exercising express discretion in a way inconsistent with a party's reasonable
 13 expectations and by acting in way not expressly excluded by the contract's terms but which
 14 nevertheless bear adversely on the party's reasonably expected benefits of the bargain."
 15 *Bike Fashion Corp. v. Kramer*, 46 P.3d 431, 435 (Ariz. Ct. App. 2002) (internal citation
 16 omitted).

17 Here, Defendants again dispute that the contract itself even applies due to the use of
 18 the term "the Company." (*See* Doc. 76 at 2, 5.) Again, the Court will not resolve this issue
 19 today. Defendants also repeat many of the same arguments as made for the breach of
 20 contract claim—namely that this claim is also conclusory, speculative, and lacks factual
 21 support. (*Id.* at 8–10.) Plaintiff counters with similar responses, pointing to instances of
 22 Havard's conduct that allegedly breached the duty. (Doc. 90 at 7–8.) This is the same
 23 conduct referenced in the breach of contract claim. (*See id.* at 6–7.)

24 Due to Havard's contractual relationship with USI, he owed a duty of good faith
 25 and fair dealing. The conduct alleged here constitutes a breach of that duty. Specifically,
 26 this conduct impaired the benefits USI would receive from the contract—that their
 27 employees would not leave and take their clients to a competitor. Through his actions,
 28 Plaintiff asserts that Havard prevented USI from receiving the benefits of their contract.

1 Plaintiff has cited specific instances of alleged conduct that met this standard, including
 2 alleged violations of various provisions and the allegation that he coordinated an exodus
 3 of clients and fellow former employees from USI to Alliant. (*Id.* at 6–7.) The Court can
 4 draw a reasonable inference of this alleged misconduct under this cognizable legal theory.
 5 Accordingly, Plaintiff has met the applicable pleading standard, and the Court will deny
 6 Defendants’ Motion on this count as to Defendant Havard.

7 **C. Breach of the Duty of Loyalty – Havard and Engles**

8 Defendants also seek to dismiss the duty the fiduciary duty loyalty claim against
 9 Havard and Engles. (Doc. 76 at 10.) Plaintiff pled this claim as a breach of the *fiduciary*
 10 duty of loyalty. (Doc. 52 at 30–31.) However, Plaintiff now frames it as a *contractual*
 11 duty, referencing Section 2.4 of the employees’ contract with USI. (Doc. 90 at 8.) These
 12 are distinct claims. Any breach of a *contractual* duty of loyalty falls within the breach of
 13 contract claim. Due to its framing in the complaint, the Court will analyze this claim as a
 14 fiduciary duty of loyalty. In short, Plaintiff claims that Havard and Engles owed a *fiduciary*
 15 duty of loyalty to act in the best interests of USI and that they breached that duty. (Doc.
 16 52 at 31.)

17 In Arizona, an employee owes his or her employer a fiduciary duty, which includes
 18 a duty of loyalty. *Security Title Agency, Inc. v. Pope*, 200 P.3d 977, 989 (Ariz. Ct. App.
 19 2008). Under this duty, an employee is precluded from actively competing with his or her
 20 employer during the period of employment. *See id.*; *see also* Restatement (Third) of
 21 Agency § 8.04 (2006) (“Throughout the duration of an agency relationship, an agent has a
 22 duty to refrain from competing with the principal . . .”). After the termination of an
 23 employment relationship a former employee is free to compete—provided there is no
 24 enforceable non-compete agreement. *McCallister Co. v. Kastella*, 825 P.2d 980, 982–83
 25 (Ariz. Ct. App. 1992).

26 Defendants argue that Havard and Engles did not owe a legal duty to provide any
 27 advance notice of their resignation or a create a transition plan. (Doc. 76 at 10.) Defendants
 28 also assert that the complaint does not allege any facts that either named Defendant

1 encouraged their “entire service team” to leave USI. (*Id.* at 10–11.) Lastly, Defendants
 2 argue that joining a direct competitor and publicizing their change in employment does not
 3 constitute a breach of the duty of loyalty. (*Id.* at 11.) Plaintiff asserts that Havard and
 4 Engles breached this duty “failing to provide any advance notice of resignation or transition
 5 plan for the USI clients they serviced, encouraging their entire service team to leave USI
 6 en masse with no transition plan for USI’ clients, and immediately joining a direct USI
 7 competitor —Alliant—and publicizing that they had done so.” (Doc. 52 at 31.) Taken
 8 together, Plaintiff alleges that Havard and Engles compounded their other contractual
 9 breaches by acting against the best interests of USI and its business, and thereby damaged
 10 USI. (Doc. 90 at 8.)

11 This claim also survives Defendants’ Motion. Plaintiff sufficiently alleges a
 12 connection between Harvard and Engles’ departure and the immediate departure of their
 13 former USI team. (Doc. 52 at 26.) Plaintiff also alleges that Harvard and Engles
 14 coordinated the en masse resignation, as evidenced by the concurrent resignations of other
 15 employees. (*See id.*) There are sufficient allegations showing that Havard and Engles
 16 began to compete with USI *before* their departure. In turn, these allegations form a
 17 plausible claim that these Defendants breached their duty of loyalty to USI. However, their
 18 duty of loyalty to USI ended on the day of their resignation. *See Taser Int’l, Inc. v. Ward*,
 19 231 P.3d 921, 926 (Ariz. Ct. App. 2010). The other alleged violations of the employment
 20 agreement occurred *after* Havard and Engles left USI and moved to Alliant. Any
 21 competition after their resignation falls within the purview of their employment agreement.
 22 As such, any potential breach of this agreement is properly covered by the breach of
 23 contract claim—not a separate tort claim for the breach of the duty of loyalty.

24 In short, the allegations for this claim also meet the applicable pleading
 25 requirements. Accordingly, the Court will deny Defendants’ Motion as to the duty of
 26 loyalty claim against Havard and Engles.

27 **D. Tortious Interference with Contract – Alliant**

28 Next, Defendants seek dismissal of Plaintiff’s tortious interference with contract

claim against Alliant. (Doc. 76 at 13.) To establish a tortious interference claim, Plaintiff must show that (1) a valid contract or business expectancy existed; (2) the interferer had knowledge of such business contracts or expectancy; (3) there was intentional interference causing a breach of the contract or business expectancy; and (4) resultant damages. *Neonatology Assocs. v. Phx. Perinatal Assocs. Inc.*, 164 P.3d 691, 693 (Ariz. Ct. App. 2007). Defendants argue that Plaintiff’s allegations relating to this claim are insufficient and do not “explain or show how Alliant was aware of Plaintiff’s purported relationships and expectancies.” (Doc. 76 at 14.) Defendants also argue that some Plaintiff’s later allegations are mere recitations of the cause of action, which fall short of the relevant pleading standards. (*Id.*) Alternatively, Plaintiff argues that Defendants overlook their more specific allegations, namely that Alliant knowingly provided substantial assistance to USI employees to resign and was aware of USI’s employment contracts based on past litigation with USI. (Doc. 90 at 11.)

First, putting aside Defendants’ contention regarding the term “the Company” that the Court has already addressed, Plaintiff has sufficiently pled the first element. Second, Plaintiff has sufficiently alleged that USI had knowledge of these employment agreements through past litigation. (Doc. 52 at 25.) Third, Plaintiff alleges numerous examples as to how Alliant facilitated Havard’s and Engles’ alleged breaches of their employment agreements. These allegations include actions by an Alliant employee to recruit USI employees and that Alliant specifically brought over USI employees in hopes of gaining USI clients. (*Id.* at 26–28.) These allegations are not speculative, but rather are based in specific factual allegations. And fourth, Plaintiff has properly pled resultant damages by referring to alleged damaged contractual and business relationships. (*Id.* at 31.)

Taken together, Plaintiff has also met the relevant pleading standards for this claim. As a result, Defendants’ Motion will be denied as to the tortious interference with contract claim against Alliant.

E. Aiding and Abetting the Breach of Duty of Loyalty - Alliant

Finally, Defendants seek to dismiss Plaintiff claim that Alliant knew or was

1 generally aware that Havard and Engles owed USI a duty of loyalty and substantially
2 assisted or encouraged them in breaching that duty. (Doc. 52 at 32.) To state a claim for
3 aiding and abetting, a plaintiff must allege facts showing: (1) a primary tortfeasor
4 committed a tort causing injury to the plaintiff; (2) the defendant knew that the primary
5 tortfeasor's conduct constituted a breach of duty; (3) the defendant substantially assisted
6 or encouraged the primary tortfeasor in the achievement of the breach. *Wells Fargo v.*
7 *Ariz. Laborers, Teamsters & Cement Masons Local No. 395 Pension Tr. Fund*, 38 P.3d 12,
8 31 (Ariz. 2002).

9 Defendants primarily assert that Plaintiff has failed to satisfactorily allege the third
10 element. (Doc. 76 at 15.) Defendants contend that Plaintiff failed to allege that Alliant
11 committed any independent act that *substantially* assisted or encouraged the alleged breach
12 of loyalty by Havard and Engles. (*Id.*) Defendants also argue that Plaintiff has not pled
13 any independent tortious act by Alliant that was unlawful. (*Id.* at 17.) Plaintiff counters
14 that it alleged Alliant was aware of the postemployment restrictions of USI employees.
15 (Doc. 90 at 13.) Plaintiff also notes that it alleged that an Alliant employee solicited a
16 client of Engles, which supports an inference that Engles encouraged this Alliant employee
17 to solicit his clients. (*Id.* at 14.) Taken together, Plaintiff argues that this is sufficient to
18 survive a motion to dismiss. (*Id.* at 13.) The Court agrees.

19 In short, the allegations sufficiently track the elements to state a plausible claim
20 under the relevant pleading standards. Plaintiff asserts that Havard and Engles moved to
21 Alliant with Alliant's knowledge and substantial assistance, while knowing that Havard
22 and Engles were breaching their agreements with USI. Again, motions to dismiss are
23 meant to test the sufficiency of the complaint, not resolve any factual disputes. *See*
24 *Dillenberg*, 836 F. Supp at 700. Here, this claim is sufficiently pled and can move forward.
25 Accordingly, the Court will deny Defendants' Motion as to the aiding and abetting the
26 breach of duty of loyalty claim against Alliant.


27 **IV. CONCLUSION**

28 For the reasons stated above,

1 **IT IS HEREBY ORDERED denying** Defendants' Rule 12(b)(6) Motion to
2 Dismiss Plaintiff's First Amended Complaint (Doc. 76).

3 Dated this 12th day of December, 2023.

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Honorable Susan M. Brnovich
United States District Judge